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Class Action Ethics

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Class actions are a unique procedural tool. They also present some unique ethical issues along with some unique solutions. In this column, we'll look at four: (1) the marketing rules that apply to recruiting class members; (2) the application of the "no contact" rule; (3) conflicts; and (4) settlements. With each, the unique aspect of class actions is that class counsel don't necessarily have the same degree of personal contact with their clients that lawyers handling even a multi-party case do. In light of that, the ethics rules rely heavily on the accompanying procedural rules governing class actions to supply the difference.

In this column, we'll focus on "national" law in the form of the ABA's influential Model Rules of Professional Conduct and Federal Rule of Civil Procedure 23. Although most states have patterned their professional rules on the ABA Model Rules (California and New York are the most notable exceptions) and their class action rules on FRCP 23, it is important to remember that key individual state variations may apply to both. Further, under ABA Model Rule 8.5(b)'s choice-of-law provisions, the forum state's ethics rules will generally control professional duties in litigation. The ABA's Center for Professional Responsibility's web site at www.abanet.org/cpr has on-line the ABA Model Rules, the accompanying comments, its interpretive ethics opinions and links to state professional rules around the country.

Marketing

The unique aspects of class actions begin at the beginning. Although some persons who may become class counsel's clients actually meet and work with the lawyer in the "usual" way, many, especially in larger class actions, do not. Rather, they may hear of the attempt to form a class through news media reports, targeted mailings or court-required notices to potential class members. ABA Formal Ethics Opinion 07-445 (2007) and Comment 4 to ABA Model Rule 7.2 both address marketing in the class action context. The former notes that both the First Amendment and the ABA's solicitation rule generally allow direct contact with prospective clients through targeted direct mail (*see Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 108 S.Ct. 1916, 100 L.Ed.2d 475 (1988) and ABA Model Rule 7.3(b); *see also Gulf Oil Co. v. Bernard*, 452 U.S. 89, 101 S.Ct. 2193, 68 L.Ed.2d 693 (1981) (reaching the same conclusion under FRCP 23)). The latter notes that court-required notices to potential class members are permitted under the marketing rules.

In-person solicitation, by contrast, is more limited under both the First Amendment and ABA Model Rule 7.3(a). Under the former, *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 98 S.Ct. 1912, 56 L.Ed.2d 444 (1978), generally denies First Amendment protection to in-person solicitation involving potentially coercive circumstances. (In *In re Primus*, 436 U.S. 412, 98 S.Ct. 1893, 56 L.Ed.2d 417 (1978), the Supreme Court accorded broader rights to in-person

solicitation involving a civil rights case, reasoning that it involved protected political, rather than commercial, speech under the First Amendment.) Under the latter, ABA Model Rule 7.3(a) generally limits in-person solicitation to situations involving close family or personal relationships or prior professional relationships.

"No Contact" Rule

The primary question in the class action context under ABA Model Rule 4.2's "no contact" rule is whether members of a potential class are "represented parties" or not before the class is certified by the court involved under the applicable procedural rule. ABA Formal Ethics Opinion 07-445 (2007) answers this question by drawing a distinction between individual class representatives and potential class members:

> "Before the class has been certified by a court, the lawyer for plaintiff will represent one or more persons with whom a client-lawyer relationship clearly has been established. As to persons who are potential members of a class if it is certified, however, no client-lawyer relationship has been established. A client-lawyer relationship with a potential member of the class does not begin until the class has been certified and the time for opting out by a potential member of the class has expired. If the client has neither a consensual relationship with the lawyer nor a legal substitute for consent, there is no representation. Therefore, putative class members are not represented parties for purposes of the Model

Rules prior to certification of the class and the expiration of the opt-out period." (*Id.* at 3.)

On a related issue arising in class actions touching on an organization's employees, Comment 7 to ABA Model Rule 4.2 discusses the application of the "no contact" rule in the organizational context. *See also* ABA Formal Ethics Opinions 06-443 (2006) (contacts with in-house counsel), 91-359 (1991) (contacts with former employees), 95-396 (1995) (discussing the "no contact" rule generally). It puts an organization's management and line level employees whose conduct is at issue within the scope of the organization's representation (by either outside or inside counsel) and, therefore, "off limits" to direct contact by opposing counsel. Other line level employees and former employees (not otherwise separately represented) are generally considered outside the scope of the organization's representation (again, by either outside or inside counsel) and, therefore, are "fair game" for direct contact by opposing counsel. Even in this latter circumstance, however, ABA Model Rule 4.4(a) prohibits opposing counsel from seeking to invade an organization's attorney-client privilege or work product protection when making otherwise permissible contacts with current or former organizational constituents.

Conflicts

Conflicts is an area where the class action procedural rules play an especially important role. Most federal district courts have local rules adopting

the forum state's rules of professional conduct as their own. *See, e.g.,* Northern District of California Civil Local Rule 11-4(a); Southern District of New York Local Civil Rules 1.3, 1.5. At the same time, federal courts have recognized that the conflict rules in the class action setting must be applied in the context of the corresponding procedural rules governing class actions. *See generally In re Agent Orange Product Liability Litigation*, 800 F.2d 14, 17-20 (2d Cir. 1986); *Lazy Oil Co. v. Witco Corp.*, 166 F.3d 581, 588-91 (3d Cir. 1999); *Wininger v. SI Management L.P.*, 301 F.3d 1115, 1122 (9th Cir. 2002). The procedural rules in play an important role in vetting conflicts on the part of class counsel. FRCP 23(a)(4) and 23(g)(1)(B) require a showing that proposed counsel for the class will "fairly and adequately" represent the class and the courts have framed this requirement in roughly comparable terms as it relates to conflicts. *See Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 856-59, 119 S.Ct. 2295, 144 L.Ed.2d 715 (1999); *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 626 n.20, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997); *see also General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 157 n.13, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982). This requirement is not simply assessed during the class certification process. Rather, FRCP 23(g)(4) requires that class counsel "must fairly and adequately represent the interests of the class" throughout the proceedings. *Id.*

Comment 25 to ABA Model Rule 1.7 addresses what can be an equally important aspect of conflicts analysis—who is *not* included in the equation:

"When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class-action lawsuit, unnamed members of the class are ordinarily not considered to be clients of the lawyer for … [conflict purposes]. Thus, the lawyer does not typically need to get the consent of such a person before representing a client suing the person in an unrelated matter. Similarly, a lawyer seeking to represent an opponent in a class action does not typically need the consent of an unnamed member of the class whom the lawyer represents in an unrelated matter."

Settlement

As with conflicts, the ABA Model Rules rely principally on the procedural safeguards built into the class action rules—principally the "fairness hearing" requirement of FRCP 23(e) in federal litigation—to ensure that clients are adequately protected in settlements. In particular, Comment 13 to ABA Model Rule 1.8 notes that class action settlements are not measured by the Model Rule 1.8(g)'s aggregate settlement standards in light of the alternative procedural protections afforded by the class action rules:

"Lawyers representing a class of plaintiffs or defendants . . . may not have a full client-lawyer relationship with each member of the class; nevertheless, such lawyers must comply with applicable rules regulating notification of class members and other procedural requirements designed to ensure adequate protection of the entire class."

On a related facet of settlements, Comment 9 to ABA Model Rule 1.5 notes that class counsel's fees are set through procedural mechanisms—primarily FRCP 23(h) in federal cases—to both appropriately compensate class counsel and to ensure the reasonableness of the fees awarded from the perspective of class members.

Summing Up

Class actions are a unique procedural vehicle. The ABA comments and ethics opinions in this setting mirror their uniqueness by relying heavily on their procedural counterparts to craft solutions that are both ethical and practical.

ABOUT THE AUTHOR

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